No. 74-773

SUPREME COURT, U. S.
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Supreme Court of the United States

October Term, 1975

SCOTT HUDGENS, An Individual,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AND

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO

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The opinions below, the basis of this court's jurisdiction and the statutory provisions involved are set out at pp. 1-2 of petitioner's brief.

QUESTION PRESENTED

Does § 7 of the National Labor Relations Act protect the right of employees of a store owner to engage in peaceful picketing in support of their strike against him at the entrance to his store, where that entrance is on land leased by the store owner from another?

STATEMENT OF THE CASE

The court below stated the issue presented, its resolution of that issue, and the stipulated underlying facts as follows:

> "The specific issue presented is whether a shopping center owner violated sections 7 and 8(a)(1) of the NLRA by prohibiting warehouse employees of the company owning one of the center's retail store tenants from picketing the entrances to the store in aid of a strike by warehouse employees. We affirm the finding by the National Labor Relations Board (Board) of an unfair labor practice and enforce its order.
>
> "The individual petitioner, Scott Hudgens, owns North DeKalb Shopping Center, a large 60-store retail shopping center located in unincorporated suburban Atlanta, but drawing its customers from throughout the metropolitan area. Like many modern shopping centers, this one consists of a single large building constructed around an enclosed mall. The mall provides an arcade 40 feet in width which is intersected by 30 feet wide auxiliary aisles connecting it to public entrances opening on the surrounding parking area. Although some center stores have entrances fronting only the parking lot and a few can be entered from either the mall or the parking area, most can only be entered from the mall. Eighty-five to ninety percent of the customers of these latter stores enter the building through one of the four primary entrances to the mall. A raised sidewalk encircling the building separates it from the large adjacent parking lot. There are five driveway entrances to the parking lot. Hudgens, as landlord, has a continuing interest in the commercial success of the center's tenants, since his leases with all but one of the stores are of the percentage type, *i.e.*, rentals are calculated on a ratio of tenant's gross sales over a guaranteed minimum rent. Additionally, Hudgens maintains a security system and exercices control and care of the common areas of the shopping center, including the mall itself and the parking lot.

> "In January 1971 warehouse employees of the Butler Shoe Company in Atlanta went on strike protesting the company's failure to agree to certain union demands in its contract negotiations with Local 315, Retail and Wholesale Department Store Union AFL-CIO, the bargaining representative of the warehouse employees. To support this strike, the union decided to picket not only the Butler's warehouse but all of its retail stores in the Atlanta area as well. Accordingly, on January 22, 1971 four warehouse employees went to North DeKalb Mall with signs reading "Butler Shoe Warehouse on Strike, AFL-CIO Local 315" to picket the two entrances to the Butler Shoe Store, both located inside the mall. Before the store opened for the day's business, Douglas Ballard, the general manager of the shopping center, noticed the potential pickets and asked them to leave, stating that picketing was not permitted in the mall under any circumstances.
>
> "The warehouse employees left, but returned within the hour and began picketing in front of the entrances to Butler's. After they had picketed for about thirty minutes, Ballard informed them by telephone that he would have them arrested for trespassing, if they continued. The pickets then departed, and subsequently, the union filed an unfair labor practice charge against Hugens with the Board." (Pet. App. A-1-A3; footnotes omitted.)

ARGUMENT

I

This proceeding began when union members who were peacefully picketing in support of a lawful strike at the entrance to the struck premises located on a privately owned shopping mall were threatened with arrest under the state trespass law. In the face of that threat the respondent Union did not adamantly maintain its position and force a confrontation (cf. *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195, 201-202 (White, J., concurring)), nor did it go to court to assert a First Amendment claim for access to the mall as a public forum (cf. *Food Employees* v. *Logan Plaza*, 391 U.S. 308). Rather, it filed a charge with the National Labor Relations Board to vindicate its members' right under § 7 of the National Labor Relations Act (hereafter the Act) "to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or for other mutual aid and protection." The question, therefore, is whether the NLRA vouchsafes the right to engage in peaceful strike activity against the owner of a store at the entrance to that store where that entrance is on land leased by the store owner from another.

(a) "[C]ollective bargaining with the right to strike at its core, is the essence of the federal scheme." (*Bus Employees* v. *Missouri*, 374 U.S. 74, 82.) And, picketing "has traditionally been a major weapon to implement the goals of a strike." (*Steelworkers* v. *Labor Board*, 376 U.S. 492, 499.) Thus, restrictions against peaceful picketing "obviously impede the right to strike." (*Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 282.) Indeed, the two are so

closely intertwined that "picketing has been equated with striking." (*Id.* at 281, n. 9.)

The right to utilize economic force is central to the statutory scheme because "when legitimately employed" it "in great measure implements and supports the principles of the collective bargaining system." (*Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234.) That right is "a 'prime motive power for agreements in free collective bargaining.' " (*Labor Board* v. *Insurance Agents*, 361 U.S. 477, 489.) The use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." (*Id.* at 495.)

Congress has sanctioned and safeguarded the strike and the picket line because "it was recognized from the beginning that agreement might in some cases be impossible [in collective bargaining] and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." (*Porter Co.* v. *NLRB*, 397 U.S. 99, 103-104.) The "Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." (*Id.* at 109.) Since our system of free collective bargaining does not countenance "government control of the results of negotiation" (*Insurance Agents*, 361 U.S. at 490), and does not provide for "compulsory arbitration, • • • the strike has been the ultimate sanction of the union" (*Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244).

Congress has therefore shown "repeated solicitude for

the right to strike * * *. While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant." (*Erie Resistor*, 373 U.S. at 234.) Pursuant to the Congressional plan self-help is a continuation of the bargaining process just as Bismarck considered war to be a continuation of diplomacy by other means.

The NLRA not only institutionalizes economic warfare, it demarcates the battlefield. As Mr. Justice White explained for a unanimous Court: "The primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer." (*Steelworkers*, 376 U.S. at 499.) Since picketing in support of a strike "has characteristically been aimed at all those approaching the situs [occupied by the struck employer] whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" (*id.*), the *Steelworkers* Court held: "In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate [at that situs] reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations" (*id.*). And, Justice White squarely rejected the employer's argument that "would [have] distinguish[ed] between picketing an entrance to a struck plant which is owned by the primary employer and picketing a gate which by design or otherwise has been conveyed to a neutral furnishing delivery service," explaining that this formalistic approach would create "an anomaly which we do not believe Congress intended." (*Id.* at 501.)

In sum, the national labor policy creates not merely the right to peacefully picket *somewhere* in support of a lawful

economic strike, it creates the precise right to do so at the "entrance to a struck" employer's premises.

(b) There can be no doubt, and petitioner does not deny, that a threat to arrest those engaging in § 7 activity is an "interference" with that activity within the meaning of § 8(a)(1). In this case the conclusion that this interference constituted an unfair labor practice would follow even if its practical effects were minimal. When Congress has determined that the right to engage in a particular form of self-help—here the right to engage in picketing in support of an economic strike at the "entrance to a struck" employer's premises (*Steelworkers*, 376 U.S. at 501)—effectuates the national labor policy, that determination cannot be set aside on the theory that other alternatives, (*viz.*, in this instance, picketing at another location or use of the mass media) are a sufficient substitute. Congress is the sole "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." (*Insurance Agents*, 361 U.S. at 497.)

Moreover, in this case the disadvantages to the Union of all the available alternatives were profound. The court below concluded:

> "The alternatives of picketing at the mall entrances or on the parking lots were not available to the union. Confronted with * * * conflicting testimony in this issue, the administrative law judge found as a fact that Ballard (the shopping center manager) told the pickets that they would have to remove themselves to the public thoroughfares. We accept this finding. * * * Nor was picketing on the public streets adjacent to the shopping center an acceptable alternative. The closest such location for picketing was approximately 500 ft. from the mall. The problems with this type of picketing * * *

[are]: (1) difficulty in reading picket signs, (2) traffic danger to pickets and (3) difficulty and hazard in handing out handbills. • • • Additionally, the farther the message is removed from the point at which action is to be taken the greater the potential for dilution or total loss of effect. • • • Finally, picketing at the entrances to the shopping center parking lot would render it difficult for the union to limit the effect of its picketing to Butler's only." (Pet. App. A14-A15.)

(c) Petitioner's asserted justification for the interference worked on § 7 rights is that "under the Georgia Criminal Trespass Law, it had a right to exclude the Union's pickets." **(Pet. Br. 16-17, n. 10.)**

The short but complete answer to that contention is the conclusion in *Steelworkers* that allowing a struck employer to insulate himself from the economic pressures of "traditional" primary picketing during a lawful strike through "convey[ance]" of title would create "an anomaly which we do not believe Congress intended." (376 U.S. at 501.) The controlling principle is that state law cannot be applied so as to limit the use of an economic weapon granted by Congress. As Mr. Justice Stewart wrote in *Teamsters Union* v. *Morton*, 377 U.S. 252, 258, 259-260:

> "[I]t is • • • necessary to determine whether • • • 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457. • • • The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines*, 372 U.S. 714, 722.
>
> • • • •
>
> "[The] weapon of self-help, [action under state law,] permitted by federal law, formed an integral part

> of the petitioner's effort to achieve bargaining goals during negotiations with the respondent. *Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761* v. *Labor Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (Emphasis added.)

The federal labor laws' supercession of inconsistent state law was most recently recognized in *Letter Carriers* v. *Austin*, 418 U.S. 264. The question there was whether "state libel judgments • • • [could] be squared with the freedom of speech in labor disputes guaranteed under federal law." (*Id.* at 266.) In answering that question in the negative, Mr. Justice Marshall observed that in *Linn* v. *Plant Guard Workers*, 383 U.S. 53:

> "A bare majority of this Court held that the NLRA did not completely pre-empt the application of state laws to libels published during labor disputes. The Court found that the exercise of state jurisdiction over such defamation actions would be a 'merely peripheral concern' of the federal labor laws, within the meaning of *Garmon* [359 U.S. 236], as long as appropriate substantive limitations were imposed to insure that the freedom of speech guaranteed by federal law was protected. Further, the Court recognized an 'overriding state interest' in protecting [state] residents from malicious libels. 383 U.S. at 61. Mr. Justice Clark, writing the opinion for the Court, also pointed out that appli-

cation of state law to libels occurring during labor disputes would not significantly interfere with the NLRB's role in considering arguable contemporaneous violations of the Act. • • •

"On the other hand, the Court recognized the danger that unrestricted libel actions under state law could easily interfere with federal labor policy. • • • [The] freewheeling use of the written and spoken word, we found [in *Linn*] has been expressly fostered by Congress and approved by the NLRB. • • •

"The Court therefore found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent "unwarranted intrusion upon free discussion envisioned by the Act." [383 U.S. at 65.] The Court looked to the NLRB's decisions, and found that 'although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false.' *Id.*, at 61. The Court therefore found it appropriate to adopt by analogy the standards of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Accordingly, we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." (418 U.S. at 271-272.)

The reasoning of *Letter Carriers* and *Linn* and their antecedents under the Supremacy Clause is fully applicable here. To be sure, in *Letter Carriers* and *Linn* the state law of torts superseded was the law of defamation which vindi-

cates society's "pervasive and strong interest in preventing and redressing attacks upon reputation" (*Rosenblatt* v. *Baer*, 383 U.S. 75, 86); here, the law of torts involved is that of trespass which vindicates individual rights in property. But the authority of Congress as an incident of its Commerce power to regulate the latter private interest is surely no less than its authority to regulate the former. (*Heart of Atlanta Motel* v. *United States*, 379 U.S. 241.) And, there can be no doubt that in enacting the NLRA Congress intended to exercise that authority. This Court early held that Congress recognized that "some dislocation of property rights may be necessary in order to safeguard [§ 7] right[s]." (*Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 802, n. 8.)

Moreover, the "danger that unrestricted" application of state trespass laws "could easily interfere with federal labor policy" (cf. *Letter Carriers*, 418 U.S. at 271-272) is manifest. *Steelworkers* establishes that picketing in support of a strike at the "entrance to a struck" employer's premises (376 U.S. at 501) "has been fostered by Congress" (*Letter Carriers*, 418 U.S. at 272). While the *Linn* case held that state defamation laws were not superseded insofar as they allowed suits for malicious defamation (as that term is defined in *Linn*), because such actions were "a merely peripheral concern" of the federal labor laws (383 U.S. at 61), the Union's picketing herein was a "weapon of self-help, permitted by federal law [which] formed an integral part of the [union's] effort to achieve its bargaining goals • • •" (*Morton*, 377 U.S. at 259). And, "[c]ollective bargaining with the right to strike at its core, is the essence of the federal scheme." (*Bus Employees*, 374 U.S. at 82.)

The parallel to the Labor Board cases which did not protect malicious defamation, and which justified the preservation of a state cause of action in *Linn* (see 383 U.S. at 61), is to be found in such cases as *Labor Board* v. *Fansteel Mfg. Co.*, 306 U.S. 240, and *Marshall Field Co.* v. *NLRB*, 200 F.2d 375 (C.A. 7) which held, respectively, that a sit-in at an employer's plant and union solicitation in certain areas of the department store were not protected under § 7. Even as preservation of state actions for malicious defamation was held in *Linn* to be consistent with the former set of Board cases, so state action for trespass in a *Fansteel* or *Marshall Field* situation would be consistent with federal law, and in our view, permissible. But the limitation stated in *Letter Carriers*—that preservation of the state cause of action is conditioned on "appropriate substantive limitations" protective of the right "guaranteed by federal law" (418 U.S. at 271)—is also applicable here. To allow state trespass laws, or the threat of their invocation by arrest, to prevent peaceful picketing at the entrance of the struck employer's premises, "would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (*Morton*, 377 U.S. at 260.)

In sum, petitioner interfered with the exercise of a § 7 right without legally tenable justification. Thus, petitioner violated § 8(a)(1) because "Section 7 guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, H.R. Rep. No. 245, 80th Cong., 1st Sess., 26, include the right to strike." (*Erie Resistor*, 373 U.S. at 233.)

II

Petitioner wholly disregards the circumstances that this case involves picketing in support of a lawful economic strike, rather than communication during an organizing campaign as in *Labor Board* v. *Babcock & Wilcox*, 351 U.S. 105 and *Central Hardware Co.* v. *NLRB*, 407 U.S. 539.[1] Whereas these precedents teach that in an organizing campaign Congress was neutral as to whether concerted activity is permissible at any particular place, the lesson of the cases we cited in part I is that with respect to the economic strike, § 7 affirmatively grants the right to picket at the "entrance to a struck" employer's premises (*Steelworkers*, 376 U.S. at 501). Since this case involves the latter situation, petitioner's reliance on the *Babcock & Wilcox* test, which was developed to govern in organizing campaigns, is misplaced. But we do not wish to leave unanswered petitioner's basic contention that he is entitled to prevail under that test.

(a) *Babcock & Wilcox* establishes that a naked demand by a union engaged in an organizing campaign for access to company property closed to the general public, standing alone, is not sufficient to overcome the right to exclude "strangers" from the property, since, in theory at least, the exclusion may not constitute a § 8(a) (1) "interference" with the organizing effort if "reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message." (351 U.S. at 112.) But *Babcock* does not embrace the op-

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[1] Petitioner properly notes (Pet. Br. 14) that *Republic Aviation* implicates different considerations than the foregoing cases or the present.

posite extreme—that the employer's naked title is always superior to the union's § 7 right. "This is not a problem of always open or closed doors • • •." (*Id.*) What is required is an "accommodation" between the owner's right to exclude and the right to communicate granted by § 7, which works "as little destruction of one as is consistent with the maintenance of the other." (*Id.*) We begin our analysis of the lessons of *Babcock* by comparing the factual situation in that case and this.

First, in contrast to *Babcock*, we are not dealing here with an industrial plant to which the general public is wholly excluded, but with an open area to which the general public, which includes these pickets, is invited. Even if it were assumed by analogy to *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, discussed below, that an invitation to come on property does not entail the total abandonment of the right to exclude persons because they engage in certain activities, it cannot be denied that so much of the property interest which reflects the right of privacy is absent in these circumstances. Moreover, petitioner did not retain fee simple absolute over that portion of its property upon which this picketing took place. For, in leasing a portion of its property to Butler Shoe Store it gave up an easement to Butler safeguarding access for Butler's "employees, agents, customers and invitees." (App. 53.) Thus, even if petitioner retained some property interests of legal significance, these are far less than that of a property owner who has not invited the general public, and who has not given up easements to others to use his land.

Second, the Union's case is far stronger here than in *Babcock* with respect to its inability to reach its intended audience through alternate channels of communication. In *Bab-*

cock the union sought to communicate with a particular group of employees who regularly worked for that employer. In this case, however, the Union sought to communicate with those members of the general public who were planning to shop at the Butler Shoe Store. As the Court of Appeals explained:

> "It is crucial to any analysis to recognize from its outset that the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store, and thus for the picketing to be effective, the location chosen was crucial unless the audience could be known and reached by other means.
>
> "This contrasts with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property." (Pet. App. A12-13.)

Since the names of the audience would never be known to the union the mailing of a communication, as the union in *Babcock* had in fact done (see 351 U.S. at 107, n. 1) would have been out of the question (at least short of a mailing to the entire "citizenry of greater Atlanta" (Pet. App. A12)). Petitioner concedes that the union's intended audience here is different than in *Babcock* but argues that this "serves to render other alternatives particularly *appropriate*" (Pet. Br. 20, emphasis in original). But none of the means proposed at Pet. Br. 21 could have matched picketing at the store entrance either in precision of identi-

fication of the chosen audience or in timeliness.[2] While there is a surface plausibility in petitioner's analogy between advertising to the community to patronize the store and the union's message not to patronize, the two situations raise entirely substantially different problems for the person with the message. An advertiser who wishes to induce patronage addresses the entire populace in the hope that even a small percentage will patronize his store or purchase a product, since that percentage is sufficient to justify the economic expense of the advertisement. But the Union was not interested in communicating with the substantial majority of the population of greater Atlanta which was not even contemplating a purchase at Butler's Shoe Store in the North DeKalb shopping center. It was concerned only with reaching that small minority who had identified themselves as potential customers by appearing at or near the store. Moreover, the implication that invitations to patronize are limited to advertisements in the mass media does not accurately describe modern marketing practices which stresses the importance of the "point of sale."[3]

Petitioner argues that the union "could have safely and effectively picketed, if it chose to supplement its picketing

[2] Petitioner refers with approval to the "variety of imaginative techniques" engaged in by the union in *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB 1030, 1038 (Pet. Br. 21, n. 19). But since those techniques were held to be an illegal secondary boycott by the Board, and the Court of Appeals affirmed, 401 F.2d 952 (C.A.D.C.), they were hardly available to the Union here.

[3] As the court below also said:

> "Hudgens certainly takes an over-broad position in urging that the General Counsel was required to establish that television and radio advertising, direct mailing, and other advertising devices directed at the geographical area from which the Butler's store at North DeKalb Shopping Center draws its its customers would be unavailing. Such alternatives might be part of the General Counsel's burden in a particular organizational situation, *cf.* The Falk Corp., 192 NLRB 716 (1971) *but see* NLRB v. United Aircraft, 324 F. 2d 128, 130 (2d Cir. 1963). However, as substitutes for consumer picketing in a case involving an audience not readily identifiable, and requiring saturation coverage of a large, populous geographical area, such a burden in patently inappropriate. Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constitute an acceptable substitute for picketing. That they were useful and utilized by the shopping center to attract customers from the general public does not establish that they were viable alternatives for taking the pickets' message to Butler customers and employees." (Pet. App. A 13.)

at the Butler warehouse, on the public right-of-ways to the entrances to the Center." (Pet. 20.) But the Court of Appeals carefully explained why that alternative was not available to the Union. (See Pet. App. A14-A15.)

In sum, the property owner's interest in exclusion is far slighter here, and the Union's need to communicate on his property is greater than it was in *Babcock*. The Union was therefore entitled to access by § 7. To hold otherwise would transmute the *Babcock* "accommodation" test into an absolute rule of exclusion.

(b) We have met petitioner on his own ground by treating the *Babcock* test as if it called for the "color-matching of cases" (cf. *Reck* v. *Pate*, 367 U.S. 433, 442). But the *Babcock* "accommodation" can be more accurately achieved through the following calculus.

The balance is to be struck, we suggest, by weighing the

financial cost to the property owner of allowing entry against the increased cost to the union of alternate channels of communication. This calculus derives from the decisions in the closely analogous situation of union access to the plant to make time and motion studies in furtherance of its collective bargaining responsibilities. As Judge Kaufman explained in the leading case of *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716, 721 (C.A. 2):

> "On the evidence and findings presented in this proceeding, we believe the Board, exercising its expertise and special competence, could properly determine that the Union's need to conduct these tests outweighed the Company's interests in closing its doors to outsiders. Cf. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Of course, we are not to be understood as saying that if the Company had established that Union-conducted studies would have severely disrupted production, see Note, 17 Stan. L. Rev. 507 (1965), we would not have a significantly different case; but, we shall defer judgment on such a situation until another day." Accord: *General Electric Co.* v. *NLRB*, 414 F.2d 918, 922-923 (C.A. 4); *Waycross Sportswear, Inc.* v. *NLRB*, 403 F.2d 832, 836 (C.A. 5).

Certain potential complications can be excluded at the outset.

First are the loss of the respective rights to exclude or to enter at will. *Babcock* recognized the value of both interests, but because they are mutually irreconcible gave precedence to neither. They are the reason that a balancing test is necessary but they are not part of the test stated. If they were, the outcome in each case would be preordained depending on which was given greater weight.

Second is the employer's interest in insulating himself

from the union's message on the ground that its receipt by its intended audience would be disadvantageous to him. This is the very interest that §§ 7 & 8(a)(1) were enacted to override.

Third, it should be noted that under the *Babcock* test disorderly or obstructive activity, or significant interference with production or employee discipline, are considered too high a cost. These are grounds for exclusion no matter how unreasonable the other channels of communication open to the union may be. Thus, even when it prevails the right of access under § 7 is limited in respect for valid competing considerations.

This leaves on one side the cost to the property owner of regulating the exercise of § 7 rights on his property and, on the union side, the increased cost of reaching its audience away from that site. These costs fairly evaluate the substantial interests at issue. Where entry imposes an insubstantial financial burden on him the owner has not demonstrated a legitimate and substantial justification for exclusion. Where non-access imposes minimal burdens on it the union has failed to demonstrate "interference" with § 7 rights. Where the cost are greater on one side than the other, "accommodation" requires that the party bearing the lesser cost give way.

We would be less than candid if we did not state that the suggested rule advanced here would most probably open company property to unions on many occasions. But this is not because the rule is slanted; it is because in fact, as opposed to theory, the real costs to the union of pursuing alternate channels of communication are normally higher than the real costs to the property owner of allowing entry.

The instant case is instructive. The petitioner attempts to prove added costs entailed in controlling the activities of two individuals with picket signs walking back and forth in front of each of the two entrances to their employer's store to advise of their strike against that employer constitutes a tacit admission that there are no such costs (See App. 130-131, 154-155.) In contrast, while the only cost of the picketing to the Union is a few dollars for placards, the evidence adduced by petitioner shows that a half page ad in the main Atlanta paper, a one minute spot on one television station, and a package of 12 one minute spots on one radio station would cost $1500 a day. (See App. 65, 67, 72.) And, unlike the picketing, these alternatives will not reach every prospective Butler customer. Indeed, most of the expense will be waisted on an audience that never contemplated shopping at Butlers. (See pp. 15-17 *supra.*)

(c) The Chamber of Commerce, as *amicus curiae* here, contends that this case should be decided by applying the test of the First Amendment cases, *Food Employees* v. *Logan Plaza*, 391 U.S. 308, and *Lloyd Corp.* v. *Tanner*, 407 U.S. 551. Petitioner explicitly disavows this approach (Pet. Br. 12-14), and we also believe it is mistaken. Indeed, it seems to us that the Chamber is guilty of the same error for which the Labor Board was taken to task in *Central Hardware*, 407 U.S. at 545-548. Since the Chamber's brief is flawed in its fundamental approach, it merits no reply. But we add for the sake of completeness that the Chamber's reliance on the First Amendment cases is self-defeating. In *Lloyd* the Court read *Logan* as follows:

> "The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put,' 391 U.S. at 320 n.9, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available." (407 U.S. at 563.)

While "[n]either of these elements was present in" *Lloyd* (*id.* at 564), both are present here.

We have already demonstrated "that no other reasonable opportunity for the pickets to convey their message to their intended audience were available." (See pp. 15-17 *supra.*) It is equally clear that the "directly related" test of *Logan* and *Lloyd* was met here. In distinguishing *Logan Valley*, the Court's opinion in *Lloyd* relied on and explained that test:

> "The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. It is nevertheless argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises. The thrust of this argument is considerably broader than the rationale of Logan Valley. It requires no relationship, direct or indirect, between the purpose of the expressive activity and the business of the shopping center. The message sought to be conveyed by respondents was directed to all members of the public, not soley to patrons of Lloyd Center or of any of its operations. Respondents could have distributed these handbills on any public sidewalk, in any public park, or in any public

building in the city of Portland." (407 U.S. at 564, footnote omitted.)[4]

In sharp contrast to *Lloyd*, the purpose of the expressive activity here could not have had a closer nexus to the business of the shopping center. If Butler's Shoe Store had not been open for business at the North DeKalb Shopping Center, the pickets would have had no occasion for discouraging patronage at that store and would not have made an appearance. And of course, unlike *Lloyd*, but as in *Logan*, the message sought to be conveyed by the union here *was* directed solely to patrons of one of the shopping center's operations.

The argument is made that the *Lloyd* test was not met because the labor dispute which gave rise to the picketing originated in Butler's warehouse rather than in the Butler Shoe Store. (Pet. Br. 17-18, COC Br. 10-11.) But that circumstance is irrelevant, as the Court of Appeals correctly understood:

> "The appropriate focus is on the message sought to be conveyed and its intended audience, not, as the amicus [Chamber of Commerce] urges, on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center" (Pet. App. A11.)

If the point of origin of the controversy had been the measure of relatedness, *Lloyd* could have been disposed of by pointing to the fact that no draft board (much less the Vietnam war) was located in the shopping center there.

[4] In the footnote the Court described the "comprehensive" injunction against Lloyd which protected the distribution of literature without "limitation as to type • • • except that it must be 'non-commercial'" (*id.* at n. 11).

Under *Lloyd*, what matters is that the Union is trying to discourage the patronizing of Butler Shoe Stores in the aid of its economic struggle with that company; the geographic origin of that controversy is irrelevant. And of course, it is likewise irrelevant under the NLRA. (Pet. App. A8.) The Chamber grudgingly acknowledges the employees' "right to picket their employer wherever he is located" but seeks to have it so hedged in that it becomes merely "abstract," (see COC Br. 11; cf. *id.* at 18). In Congress' view the "use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." (*Insurance Agents*, 361 U.S. at 495; see pp. 4-6 *supra*.)

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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